UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JEFFREY ROSENBLATT,	)	
	)	
Plaintiff	)	
	)	
v.	)	***Civil No. 97-312-P-H***
	)	
UNITED STATES DEPARTMENT	)	
OF INTERIOR, BUREAU OF	)	
INDIAN AFFAIRS,	)	
	)	
Defendant	)	

RECOMMENDED DECISION ON CROSS-MOTIONS FOR SUMMARY JUDGMENT

This action arises under the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552. The plaintiff, an attorney appearing *pro se*, is an opponent of a gaming facility proposed to be constructed in Albany Township, Maine by the Passamaquoddy Indian Tribe ("Tribe"). He has requested that the Bureau of Indian Affairs of the Department of the Interior ("Bureau") furnish him with a copy of a contract concerning the financing of the proposed facility, entered into by the Tribe and an entity known as Snake River Financing, Ltd. ("Snake River"), and filed by the Tribe with the Bureau. After much delay and confusion, the Bureau sent the plaintiff a redacted copy of the contract. He has filed suit in an effort to compel the Bureau to furnish the contract in its entirety. Both sides seek summary judgment in their favor. For the reasons that follow, I recommend that the court grant the plaintiff's motion and order the disclosure of the contract in question in unredacted form.

I. Summary Judgment Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and give that party the benefit of all reasonable inferences in its favor. *Cadle Co. v. Hayes*, 116 F.3d 957, 959 (1st Cir. 1997). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir. 1995) (citing *Celotex*, 477 U.S. at 324); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Ass'n of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Scenario

The relevant facts are largely undisputed. The plaintiff, a resident of Albany Township, opposes the Tribe's plans to construct a high-stakes bingo facility in the township. First Amended Complaint (Docket No. 16) at ¶¶ 1, 3; Amended Answer (Docket No. 22) at ¶¶ 1, 3 (referring to paragraphs 1 and 3 of the Answer to plaintiff's original complaint); Affidavit of Jeffrey Rosenblatt ("Rosenblatt Aff.") (Docket No. 20) at ¶ 7 (describing plaintiff's formal intervention before Maine

Land Use Regulation Commission ("LURC") to oppose project). The Tribe has represented that it has entered into a contract with Snake River relative to the financing of the project. First Amended Complaint at ¶ 3; Amended Answer at ¶ 3.

On or about June 16, 1997 the plaintiff telephoned the Bureau's Washington headquarters to inquire about the existence of documents describing Snake River's plans for loaning money to the Tribe. Rosenblatt Aff. at ¶ 24. He was directed to the Bureau's Eastern Area Office in Arlington, Virginia. *Id.* The plaintiff called the regional office and spoke there with Bureau employee Bill Wakole, who said he was not familiar with the Tribe or any contract between the Tribe and Snake River. *Id*. at ¶ 25. Wakole suggested that the plaintiff request the document directly from the Tribe; the plaintiff responded that the Tribe had already refused precisely such a request. *Id*. Wakole confirmed that any contract that had obtained the necessary federal approvals under 25 U.S.C. § 81 would be on file with the Bureau.[1] *Id.* Wakole promised to look into the matter and get back to the

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[1] This provision, which governs certain contracts to which an Indian tribe is a party, is highly relevant to the instant proceedings and, in its entirety, reads as follows:

> No agreement shall be made by any person with any tribe of Indians, or individual Indians not citizens of the United States, for the payment or delivery of any money or other thing of value, in present or in prospective, or for the granting or procuring any privilege to him, or any other person in consideration of services for said Indians relative to their lands, or to any claims growing out of, or in reference to, annuities, installments, or other moneys, claims, demands, or thing, under laws or treaties with the United States, or official acts of any officers thereof, or in any way connected with or due from the United States, unless such contract or agreement be executed and approved as follows:
>
> First. Such agreement shall be in writing, and a duplicate of it delivered to each party.
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> Second. It shall bear the approval of the Secretary of the Interior and the Commissioner of Indian Affairs indorsed upon it.

(continued...)

plaintiff. *Id.* The plaintiff asked Wakole if such a contract would be available under the FOIA; Wakole responded in the affirmative and advised the plaintiff to make a written request to Franklin Keel, director of the Bureau's Eastern Area Office. *Id.* The plaintiff addressed such a letter to Keel on June 16, 1997. *Id*. at ¶ 26.

On June 27, 1997 the plaintiff attempted to telephone Wakole but received only a taped message advising that he was on vacation until July 7 and referring callers to another Bureau employee, Vicki Hudvik. *Id*. at ¶ 27. The plaintiff spoke with Hudvik on June 27. *Id*. at ¶ 28. She told the plaintiff she was familiar with the Tribe but not any contract between the Tribe and Snake River, suggesting that the plaintiff seek the document directly from the Tribe. *Id*. at ¶ 28. As he had

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[1](...continued)

> Third. It shall contain the names of all parties in interest, their residence and occupation; and if made with a tribe, by their tribal authorities, the scope of authority and the reason for exercising that authority, shall be given specifically.
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> Fourth. It shall state the time when and place where made, the particular purpose for which made, the special thing or things to be done under it, and, if for the collection of money, the basis of the claim, the source from which it is to be collected, the disposition to be made of it when collected, the amount or rate per centum of the fee in all cases; and if any contingent matter or condition constitutes a part of the contract or agreement, it shall be specifically set forth.
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> Fifth. It shall have a fixed limited time to run, which shall be distinctly stated.
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> All contracts or agreements made in violation of this section shall be null and void, and all money or other thing of value paid to any person by any Indian or tribe, or any one else, for or on his or their behalf, on account of such services, in excess of the amount approved by the Commissioner and Secretary for such services, may be recovered by suit in the name of the United States in any court of the United States, regardless of the amount in controversy; and one-half thereof shall be paid to the person suing for the same, and the other half shall be paid into the Treasury for the use of the Indian or tribe by or for whom it was so paid.

25 U.S.C. § 81.

done with Wakole, the plaintiff explained that the Tribe had already refused his request. *Id*. Hudvik suggested that the plaintiff file a written FOIA request, in which instance she would personally see that the plaintiff received the document. *Id*. The plaintiff told Hudvik he had already submitted such a written request, by letter on June 16, whereupon Hudvik promised to look into the matter and get back to the plaintiff. *Id*. On June 30, 1997 the plaintiff faxed to the Eastern Area Office a copy of his June 16 FOIA letter to Keel, also dispatching a copy by regular mail on that date. *Id*. at ¶ 30. On or about June 30, 1997 the plaintiff's secretary — Katherine Ledger — called Hudvik's office. Affidavit of Katherine Ledger ("Ledger Aff.") (Docket No. 21) at ¶ 2. The person with whom Ledger spoke referred her to several other persons, among them Loretta White Eagle and Starr Penland, who were described as the officials in charge of financing contracts relating to Indian gaming facilities. *Id*.

Ledger spoke with White Eagle on July 3, 1997; she told Ledger that there was no record of any contract between the Tribe and Snake River that had been filed within the preceding year. *Id*. at ¶ 4. White Eagle further advised Ledger that a copy of the contract may have been filed with an entity she identified as the Indian Gaming Commission, in which case, according to White Eagle, the Commission would eventually send a copy of it to the Bureau. *Id*. White Eagle asked Ledger if the plaintiff's request for the document was an official FOIA request. *Id*. Ledger responded affirmatively, noting that the plaintiff had by then sent the Bureau three distinct written communications invoking the FOIA. *Id*. White Eagle replied that the Bureau had "nothing in writing" from the plaintiff. *Id*. Ledger faxed the June 16 letter to the Bureau once more. *Id*.

Ledger also telephoned Keel's office on July 3 to find out if he had received the plaintiff's FOIA requests. *Id*. at ¶ 5. A woman who identified herself as Keel's secretary reported that the

Bureau had "no log" indicating the receipt of the plaintiff's FOIA requests. *Id*. The secretary indicated that requests for contracts would go to Penland and that questions or requests relating to Indian gaming would go to Wakole, then on vacation. *Id*.

The plaintiff telephoned Penland on July 3. She told the plaintiff that Keel was her boss, that she knew nothing about the plaintiff's FOIA request or, indeed, about any contract involving the Tribe or its proposed bingo facility in Maine. Rosenblatt Aff. at ¶ 33. Penland suggested that the plaintiff obtain the contract directly from the Tribe and, for the third time, the plaintiff indicated that he had already done so to no avail. *Id*. Penland told the plaintiff that such a contract might be on file at some unspecified "other office," promising to check and get back to him. *Id*. She declined to provide any details. *Id*. At this point, the plaintiff telephoned the offices of his congressional representatives — Senator Olympia Snowe and Representative John Baldacci — for assistance. *Id.* at ¶ 34. Within the week, Baldacci's office wrote to Bureau official Jackelyn M. Cheek to request information on behalf of the plaintiff. *Id*. at ¶ 37.

On July 7, 1997 Wakole called the plaintiff's office and spoke with Ledger. Ledger Aff. at ¶ 6. Wakole told Ledger he was unaware of any contract involving the Tribe and had seen no such document on file at the Bureau. *Id.* He stated that if such a contract were ever filed with the Bureau, he would send a copy to the plaintiff immediately. *Id*. The plaintiff send a letter to Wakole on July 10, 1997 stating that he understood Wakole to have advised him that the Bureau had no record of any contract involving the Tribe and the construction of a gaming facility in Maine. Rosenblatt Aff. at ¶ 38.

The plaintiff sent Keel a letter on July 29 indicating that the Tribe was continuing to insist that it had filed its Snake River contract with the Bureau and that the contract had received the

approval of the Secretary of the Interior and the Commissioner of Indian Affairs as required by 25 U.S.C. § 81. *Id*. at ¶ 39; Exh. F to First Amended Complaint.[2] On August 1, 1997 an aide to Representative Baldacci — Daryl Fort — called Cheek to follow up on the request Baldacci had filed on behalf of the plaintiff. Rosenblatt Aff. at ¶ 40. Cheek told Fort that she had not received Baldacci's request and that it must have been lost. *Id*. Fort faxed Cheek a second copy of Baldacci's inquiry. *Id*. By letter dated August 6, 1997 Senator Snowe confirmed that her office had also contacted the Bureau on the plaintiff's behalf. Exh. I to First Amended Complaint.

Fred Dorsey, acting director of the Bureau's Office of Management and Administration, responded in writing to Baldacci's inquiry on August 8, 1997, with a copy to the plaintiff. Exh. J to Complaint at 1-2. Dorsey confirmed that the Tribe had submitted the contract in question to the Bureau for review pursuant to 25 U.S.C. § 81, and that on May 22, 1996 the Bureau "determined that the Tribe was in compliance with Section 81." *Id*. at 1. Noting that the Tribe had refused to furnish the plaintiff with a copy of the agreement, Dorsey stated that the Bureau's Eastern Area Office had sent a copy of the document to his office for a "release determination." *Id*. Invoking 43 C.F.R. § 2.15 and Executive Order 12600,[3] Dorsey advised that the Bureau had requested the Tribe's "comments on what portions of the Loan Agreement, if any, are releasable under the FOIA." *Id*. Dorsey stated that the Bureau expected a response from the Tribe by August 22, 1997. *Id*. at 2.

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[2] The exhibits to the First Amended Complaint appear in two portions of the record. Exhibits A through K were filed with the original complaint (Docket No. 1). Exhibits L through R are appended to the plaintiff's motion to amend the complaint (Docket No. 5) that was granted by the court.

[3] Executive Order 12600, signed by the president on June 23, 1987, is entitled "Predisclosure Notification Procedures for Confidential Commercial Information" and is reprinted in 5 U.S.C.A. § 552 (1996).

There was apparently no further word from the Bureau until September 25, 1997 when the plaintiff telephoned Dorsey. Rosenblatt Aff. at ¶ 44. Dorsey stated that he was in receipt of a letter dated August 26, 1997 from the Tribe's legal counsel, which he promised to fax to the plaintiff.[4] *Id*. He did not do so. *Id*. The same day, apparently after the plaintiff spoke with Dorsey, he received a telephone call from Bureau employee Shirley LaCourse. *Id*. at ¶ 45. She stated that she had just discussed the matter with Dorsey, and had sent the Tribe's legal counsel a letter on September 15, 1997 indicating that the Bureau intended to furnish the plaintiff with a copy of the contract on October 2, 1997, minus redactions suggested by the Tribe, absent further objection from the Tribe.[5] *Id*. LaCourse promised to send copies of the Tribe's August 26 letter and her September 15 letter, but did not do so. *Id.* By letter dated September 25, 1997 counsel to the Tribe pressed its position that the entire agreement should not be disclosed and also indicated that it would be "suggesting

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[4] This letter, written by attorney Gregory Sample on behalf of the governor of the Passamaquoddy Tribe, flatly asks the Bureau to refuse to release a copy of the loan agreement or "any of the papers" submitted with it, based on the non-disclosure provisions of 5 U.S.C. § 552(b)(4), governing commercial or financial information obtained by the government. Letter of Gregory W. Sample dated August 26, 1997 and addressed to Fred Dorsey, Exh. D to Declaration of Thomas Hartman ("Hartman Decl.") (Docket No. 15), at 1. After laying out its position concerning this exemption, the Tribe went on to express concern that release of the requested information to the plaintiff

> might simply add fuel to a vigorous campaign of misinformation and disinformation now being presented to the public and the State regulatory agency now considering the issuance of permits under State law for the bingo development project funded by the Snake River Loan Agreement.

Id. at 2.

[5] This letter is of record and suggests that it was the Bureau that developed the list of redactions in response to the Tribe's position that the entire agreement should be withheld from disclosure. *See* Letter of James H. McDivitt dated September 15, 1997 and addressed to Honorable John Stevens, Exh. E to Hartman Decl. The purpose of the letter is to inform the Tribe as to what portions of the agreement the Bureau intended to redact. *Id.*

additional redactions" beyond those proposed by the Bureau. Letter of Gregory W. Sample dated September 25, 1997 and addressed to James H. McDivitt, Exh. F to Hartman Decl. The Tribe asked the Bureau to "withhold any release" pending receipt of its additional proposed redactions "within 10 work days after September 23." *Id*. The Tribe submitted these additional proposals by letter dated October 3, 1997. Letter of Gregory W. Sample dated October 3, 1997 and addressed to James H. McDivitt, Exh. G to Hartman Decl.[6]

Meantime, having still received nothing on October 6, 1997, the plaintiff twice attempted to call LaCourse without success. Rosenblatt Aff. at ¶ 46. He reached her on October 9, 1997. *Id*. at ¶ 47. She stated that she was in receipt of a letter from the Tribe's attorney "requesting an extension," that the Tribe had submitted additional comments to the Bureau, and that she could release nothing to the plaintiff at that time. *Id*. The plaintiff instituted proceedings in this court by complaint dated October 14, 1997 and received by the clerk the following day.

The Bureau released a redacted copy of the loan agreement to the plaintiff on November 25, 1997. Hartman Decl. at ¶ 13. Included were the loan agreement itself, an amendment to the agreement, a security agreement and a promissory note.[7] *Id*. By letter dated December 3, 1997 the plaintiff advised the Bureau of his position that it had failed to provided two exhibits referenced in the loan documents — a "description of collateral" and a deed. Rosenblatt Decl. at ¶ 55. The

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[6] The copy of this letter that appears in the record is itself in redacted form, so that the court is unable to limn fully the additional redactions proposed by the Tribe. It is also not clear to what extent the Bureau followed the Tribe's recommendations concerning redaction. *See* Hartman Decl. at ¶ 12 (stating only that the redactions were made "in consultation" with the Tribe).

[7] The documents, in their redacted form, appear as part of Exhibit I to the Hartman Declaration. The Bureau has also provided what it represents to be a complete copy of the documents under seal for the court's *in camera* review. These sealed documents appear as Exhibit 1A to the Hartman Declaration.

plaintiff requested immediate production of the two documents and a clarification from the Bureau as to whether their non-disclosure to that date had been intentional or unintentional. *Id.* By letter dated December 15, 1995, received by the plaintiff on December 22, the Bureau responded that the omission was unintentional, that the two documents had been lost and that, accordingly, they could not be furnished to the plaintiff. *Id*. at ¶ 56.[8]

III. Discussion

The basic purpose of the FOIA is "to ensure an informed citizenry, vital to the functioning of a democratic society . . . or, stated more specifically, to open [federal] agency action to the light of public scrutiny." *Church of Scientology Int'l v. United States Dept. of Justice*, 30 F.3d 224, 228 (1st Cir. 1994) (citations and internal quotation marks omitted).

> The policy underlying FOIA is thus one of broad disclosure, and the government must supply any information requested by any individual unless it determines that a

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[8] That, at least, is what the plaintiff states he understood the Bureau to have communicated to him. Here, verbatim, is what the Bureau actually wrote to him:

> This is in response to your letter of December 3, 1997, in which you requested Exhibits A and B to the Loan Agreement between the Passamaquoddy Indian Tribe and Snake River Financing, Ltd. We sent you the redacted Loan Agreement on November 26, 1997.
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> The omission of the Exhibits was unintentional; when the Loan Agreement was referred to Central Office from the Eastern Area Office (EAO), the referenced exhibits were not attached. The Central Office FOIA Coordinator contacted the EAO FOIA Coordinator at that time, and was informed that EAO could not locate the exhibits.
>
> Since receiving your letter, we have consulted with the EAO once again, and have been informed that EAO does not have the exhibits. We regret that we could not be of more assistance.

Exh. R to Complaint. The letter bears the illegible signature of the "Acting Director, Office of Management and Administration," not otherwise identified by name. *Id*.

> specific exemption, narrowly construed, applies. The government bears the burden of demonstrating the applicability of a claimed exemption.

Id. (citations omitted). The FOIA contains nine enumerated exemptions from the general policy of disclosure. 5 U.S.C. § 552(b). Here, the Bureau relies on the fourth exemption, which covers "trade secrets and commercial or financial information obtained from a person and privileged or confidential." *Id*. at subsection (b)(4). The plaintiff does not dispute the government's position that the Tribe is a "person" within the meaning of this provision. The Bureau, in turn, does not rely on the aspect of the exemption covering documents that are privileged, contending solely that they are confidential in nature and therefore exempt from disclosure.

"[I]nformation will not be regarded as confidential under exemption 4 unless it can be demonstrated that disclosure will harm a specific interest that Congress sought to protect by enacting the exemption." *9 to 5 Org. for Women Office Workers v. Board of Governors of the Fed. Reserve Sys*., 721 F.2d 1, 9 (1st Cir. 1983). The two interests "most frequently threatened by the disclosure of commercial or financial information" are the government's "ability to obtain necessary information in the future" and the infliction of "substantial harm to the competitive position of the person from whom the information was obtained." *Id*. at 8, 9-10 (quoting *National Parks & Conservation Assn. v. Morton*, 498 F.2d 765, 770 (D.C. Cir. 1974) ("*National Parks I*"), and stressing that these two interests are not the only ones cognizable). Here, the government contends that both of these interests would be threatened by disclosure of the redacted materials, and also takes the position that other protected interests counsel against disclosure.

Plainly, the Bureau's ability to receive information in the future will not be affected in the least by the disclosure sought by the plaintiff. As noted, *supra*, 25 U.S.C. § 81 forbids the making

of an contractual agreement with an Indian tribe, relative to tribal lands or arising under a U.S. treaty with a tribe, without federal approval. By way of contrast, the *9 to 5* case is an excellent example of a situation in which the government's interest in obtaining necessary information is potentially at stake. In that case, requested data was obtained by the Federal Reserve Board through its participation in a survey of Boston-area employers so as to allow it to pay salaries that are competitive with those of other employers in the Boston market. *9 to 5*, 721 F.2d at 3. The Federal Reserve's failure to treat the data as confidential subjected it to expulsion from the survey project. *Id*. Obviously, there would have been no such risk if, as here, the data were included in written contracts that would be void unless submitted to the agency. *See National Parks I*, 498 F.2d at 770 (when information is supplied to government "pursuant to statute, regulation or some less formal mandate . . . there is presumably no danger that public disclosure will impair the ability of the Government to obtain this information in the future"); *see also Critical Mass Energy Project v. Nuclear Regulatory Comm'n*, 975 F.2d 871, 878 (D.C.Cir. 1992) (government's ability to obtain necessary information may also be impaired if disclosure would affect quality of information received under mandatory reporting regime).[9]

Next, the Bureau contends that the requested disclosure would result in a "[c]ompetitive

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[9] In *Critical Mass*, the District of Columbia Circuit held that information is submitted to the government on a "voluntary basis" is confidential, and thus subject to Exemption 4, "if it is a kind that would customarily not be released to the public by the person from whom it was obtained." *Critical Mass*, 975 F.2d at 878-79. The Bureau takes the position that this test, more likely to shield information from disclosure than the harm-to-competition test in *National Parks I*, should govern here. I disagree. Even assuming that *Critical Mass* is applicable in the First Circuit, *see DeLorme Publ'g Co. v. National Oceanic & Atmospheric Admin.*, 917 F.Supp. 867, 874 n.1 (D.Me. 1996) (noting that First Circuit "has not yet addressed" issue), it would defy logic to conclude that a contract submitted to the government for approval pursuant to section 81 is a disclosure made on a voluntary basis.

disadvantage." Defendant's Motion and Incorporated Memorandum for Summary Judgment ("Bureau Memorandum") (Docket No. 13) at 14-15. Specifically, the Bureau refers to "[t]he possibility of future required disclosure of proprietary financial information . . . inhibit[ing] potential lenders from dealing with Indian tribes" and (2) the fact that "prospective financiers would have access to the terms previously accepted by the tribe." *Id.* In evaluating these contentions, the court must keep in mind that the Bureau bears the burden of demonstrating that the circumstances justify nondisclosure, and that "[c]onclusory and generalized allegations are indeed unacceptable as a means of sustaining the burden." *National Parks & Conservation Assn. v. Kleppe*, 547 F.2d 673, 679 n.20, 680 (D.C.Cir. 1976) ("*National Parks II*") (noting that such nonspecific allegations "generally frustrate the fair assertion of rights under the Act"). To sustain its position, the Bureau must prove that Indian tribes actually face the competition alleged and that disclosure of the data in question would likely result in harm to the asserted competitive position. *Id*. at 679. The government has failed to sustain its burden.

The classic Exemption 4 situation is one in which the granting of an FOIA request would result in the disclosure of bidding information submitted by a government contractor and the data in question would provide "help to competitors attempting to estimate and undercut the contractors' bids." *GC Micro Corp. v. Defense Logistics Agency*, 33 F.3d 1109, 1115 (9th Cir. 1994). Another variation is the situation in which proprietary information reported to the government has a commercial value to the competitors of the reporting entity. *See, e.g., Northwest Coalition for Alternatives to Pesticides v. Browner*, 941 F.Supp. 197, 202 (D.D.C. 1996) (involving disclosure of inert ingredients of pesticides). The emphasis is consistently on the disclosing entity's position *vis à vis* third-party competitors, rather than in negotiations with potential contractors. Here, based on

the record developed in the summary judgment proceedings, I believe it would amount to improper speculation to accept the Bureau's premise that disclosure would inhibit lenders from doing business with Indian tribes in the future. Moreover, even accepting this proposition *arguendo*, the Bureau cites no case in which Exemption 4 has shielded information because it might create a disadvantage at the bargaining table, and independent research also discloses no such authorities. In my view, for the court to extend Exemption 4 in such a novel manner would be improvident and inconsistent with established principles requiring narrow interpretation of the FOIA exemptions.

The Bureau's related contention, that disclosure would make it less likely that prospective financiers would do business with Indian tribes, is also inconsistent with the established principles that guide interpretation of the Act. To accept such a proposition on the present record would be to engage in sheer speculation. Given the mandatory government approval regime established by 25 U.S.C. § 81, the court is simply not in a position to determine whether the added complication of public disclosure of the contract would deter financiers from doing business with Tribes, or even if the totality of the government's involvement in such contracts would actually lead financiers to *prefer* section 18 contracts to deals not covered by these provisions.

Finally, in light of the First Circuit's clarification in *9 to 5* that the interests identified in *National Parks I* are not necessarily the only ones protected by Exemption 4, the Bureau takes the position that certain additional factors counsel against the requested disclosure. Specifically, the Bureau contends that disclosure would "add fuel" to what the Tribe regards as a "vigorous campaign of misinformation" concerning its bingo project, and that the Tribe has an interest in limiting disclosure "to those terms [of the contract that are] relevant to the pending state regulatory proceeding, i.e., financial capacity to complete the project for which land use permits were being

sought." Bureau Memorandum at 16. I agree with the Bureau that the *Tribe* has an interest in not providing ammunition to opponents of its development plans, but this completely begs the question whether this is a "specific interest that Congress sought to protect by enacting the exemption." *9 to 5*, 721 F.2d at 9. It is not surprising that the Bureau has apparently been unable to find authority to support such a construction of Exemption 4, given that, as noted *supra*, Congress enacted FOIA to promote the development of an informed citizenry and open agency action — here the giving of a statutorily required federal imprimatur to a significant real estate development in a rural community — to public scrutiny. Indeed, having conducted an *in camera* review of the information redacted by the Bureau, I would observe that disclosure of the entire contract can only serve to replace any misinformation with the truth concerning a project that has obviously and legitimately become a significant public policy issue throughout Maine. *See, e.g.*, A. Jay Higgins, *Bill would give tribes more say in land use*, Bangor Daily News, Mar. 12, 1998, 1998 WL 3120797 (discussing bill to remove certain Indian lands from LURC jurisdiction and noting that, in Albany Township, "there has been some speculation over possible tribal attempts to construct a full-blown casino at the bingo site. Tribal[] leaders have staunchly maintained they have no such plans, but area residents claim they have evidence to the contrary.").

One final observation is in order. The plaintiff in his summary judgment motion is careful to assert that he is entitled not only to the production of the redacted portion of the contract documents he has received, but to an order compelling the Bureau to conduct a reasonable search for the two additional contract documents it told the plaintiff it had lost. The Bureau's submission makes clear that such an order is unnecessary: What once was lost has now been found. The loan agreement submitted to the court includes an unsigned promissory note marked as Exhibit A, a

warranty deed marked as Exhibit B, a security agreement marked as Exhibit C, a "Description of Collateral" also marked as Exhibit A, a "Gaming Enterprise Term Sheet" marked as Exhibit D, a "Management Agreement Term Sheet" marked as Exhibit E, and three additional documents not attached to the loan agreement: a promissory note, a security agreement and a document entitled "First Amendment to Loan Agreement Dated May 23, 1996." The plaintiff is entitled to a copy of all documents submitted to the court *in camera* in unredacted form. The Bureau, on the other hand, and in my view, is entitled to an expression of the court's concern as to whether the agency is keeping faith with its obligations under FOIA and the Department of the Interior's Regulations promulgated thereunder. *See* 43 C.F.R. § 2.13 ("It is the policy of the Department of the Interior to make the records of the Department available to the public to the greatest extent possible, in keeping with the spirit of the Freedom of Information Act"). The letter, quoted *supra* at note 8 and informing the plaintiff that he would not be receiving the requested attachments, is a study in obfuscatory prose — never actually stating that the Bureau had lost or never received the additional documents at issue. Considered in the context of the confusing, contradictory and uncooperative contacts the plaintiff has had with the Bureau throughout his FOIA odyssey, further action may be appropriate upon request. *See* 5 U.S.C. § 552(a)(4)(E) and (F) (court may assess reasonable attorney fees when complainant has "substantially prevailed" and, in such a case, may also issue "written finding that the circumstances surrounding the withholding raise question whether agency personnel acted arbitrarily or capriciously," triggering disciplinary investigation of responsible personnel). The ultimate determination of such a request is, of course, properly left to another day.

IV. Conclusion

For the foregoing reasons, I recommend that the Bureau's motion for summary judgment be **DENIED**, that the plaintiff's motion for summary judgment be **GRANTED** and that judgment enter in favor of the plaintiff directing the Bureau (1) to furnish the plaintiff with an unredacted copy of the contract, and all related documents, that were the subject of the plaintiff's document request and (2) to certify to the court in writing within five business days that it has fully and diligently complied with the court's order.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated this ___ day of April, 1998.

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David M. Cohen
United States Magistrate Judge